Supreme Court, U.S.
FILED
NOV 28 2003
OFFICE OF THE CLERK

No. 02-1794

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MANUEL FLORES-MONTANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, under the Fourth Amendment to the United States Constitution, customs officers at the international border must have reasonable suspicion in order to remove, disassemble, and search a vehicle's gas tank for contraband.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The order of the district court (Pet. App. 2a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

2. Section 1581(a), Title 19, U.S.C., provides:

> Customs officers. Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well within his district, and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

STATEMENT

Respondent was charged with one count of unlawfully importing marijuana, in violation of 21 U.S.C. 952, 960; and one count of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). The district court granted respondent's motion to suppress the marijuana that was seized from the gas tank of respondent's motor vehicle at the international border. Pet. App. 2a-3a. The court of appeals summarily affirmed. *Id.* at 1a.

1. On February 12, 2002, Customs Inspector Visente Garcia conducted an inspection of a 1987 Ford Taurus station wagon driven by respondent as he entered the Otay Mesa Port of Entry along the California border. As the inspector asked some questions, respondent avoided eye contact. Respondent's hand also was shaking as he handed the inspector his passport. The inspector tapped on the vehicle's gas tank with a screwdriver and noticed the tank sounded solid. The inspector was also informed that a narcotics detector dog had alerted to the vehicle. Respondent was then removed from the vehicle, and the vehicle was driven to a secondary inspection station.

At 4:20 p.m., Customs Inspector Jovita Pesayco at the secondary station inspected the gas tank by tapping it and observing a solid sound. He subsequently requested a mechanic under contract with Customs to come to the border station to remove the tank. Within 20 to 30 minutes, the mechanic arrived. He raised the car on a lift, loosened the straps and unscrewed the bolts holding the gas tank to the undercarriage of the vehicle, and then disconnected some hoses and electrical connections. That process took 10 to 15 minutes. After the gas tank was removed, Inspector Pesayco hammered off bondo (a putty-like hardening substance that is used to seal openings) from the top of the gas tank. That process took an additional 5 to 10 minutes. The inspector opened an access plate underneath the bondo and found 37 kilograms of marijuana bricks. Pet. App. 4a-5a (Declaration of Visente Garcia, senior border inspector for the United States Customs Service); *id.* at 7a-9a (Declaration of Jovito Pesayco, senior border inspector for the United States Customs Service).

On February 27, 2002, respondent was indicted on one count of unlawfully importing approximately 37 kilograms of marijuana, in violation of 21 U.S.C. 952, 960, and one count of possession of that marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Relying on *United States* v. *Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002), respondent moved to suppress the marijuana uncovered from the gas tank. In *Molina-Tarazon*, a divided panel of the Ninth Circuit held that the removal of the gas tank is a nonroutine border search that requires reasonable suspicion. *Id.* at 713-

717. The court also held that, on the facts in that case, the officers had reasonable suspicion to conduct the search. *Id.* at 717-718.

In response to respondent's motion in this case to suppress evidence of the marijuana found during the gas tank search, the government advised the district court that it was not relying on reasonable suspicion as a basis for denying respondent's suppression motion, but that it believed that *Molina-Tarazon* was wrongly decided. The government contended that when a vehicle seeks to cross the border, 19 U.S.C. 1581(a) authorizes customs officers to "search the * * * vehicle and every part thereof," without any requirement of a warrant or particularized suspicion. The government also contended that "[t]his statute is coextensive with the Constitution." Gov't Response and Opp. to Defendant's Mot. to Suppress Evidence Based on Alleged Non-Routine Border Search 5. The government's response included as exhibits four affidavits concerning the removal of the gas tank in this case and the need to inspect vehicles by removing gas tanks in other cases. Pet. App. 4a-18a.

2. On June 19, 2002, the district court ordered the suppression of the drugs seized from respondent's gas tank. Relying on *Molina-Tarazon*, the court held that the search was nonroutine and therefore required reasonable suspicion. Pet. App. 3a. The court further found that "the Government has waived its right to rely on the alternative basis of reasonable suspicion, and * * * that, in this case, the Government has declined to establish reasonable suspicion." *Ibid.* The district court also found "that the facts set forth in the Government's declarations and motion exhibits are the facts in this case." *Ibid.*

3. On July 26, 2002, the government petitioned for initial hearing en banc, requesting the court of appeals to reconsider its decision in *Molina-Tarazon*. On March 14, 2003, the court of appeals issued an order summarily affirming the district court's judgment on the basis of *Molina-Tarazon*. Pet. App. 1a.

SUMMARY OF ARGUMENT

The disassembly and search of a vehicle's gas tank at the international border implicates the Nation's acute interest in protecting against the entry of unauthorized persons and contraband and constitutes a minimal intrusion on a traveler's property interests. Accordingly, such a search is reasonable under the Fourth Amendment without any requirement that government officials possess individualized suspicion.

A. Given the government's unique interest at the border, this Court has made clear that customs officials may conduct "routine" searches at the border without any level of suspicion. *United States* v. *Montoya de Hernandez*, 473 U.S. 521, 538 (1985). For certain highly invasive searches (such as x-rays, body-cavity, and strip searches of the person), the applicable level of suspicion depends on a balance of the competing interests at stake. *Id.* at 541. A gas tank search falls within the category of a routine search because it involves no extraordinary level of intrusion. But even if the Court were to regard a gas tank search as nonroutine, the balance of the government's and private interests leads to the conclusion that a suspicionless gas tank search at the border is reasonable.

B. The government has an overriding interest in maintaining territorial integrity at the international border. That interest encompasses not only the enforcement of the customs laws but also the need to

prevent the entry of contraband, illegal aliens, communicable diseases, harmful substances, and instruments of terrorism. It has long been settled that customs officials at the border may search, without particularized objective suspicion, an arriving person's clothing, pockets, shoes, purses, wallets, and baggage, as well as the person's vehicle. That broad authority also permits a complete and thorough search of vehicular compartments, such as the trunk and glove compartment.

Under those principles, the government may conduct suspicionless searches of a vehicle's gas tank, a relatively large container that is commonly used by smugglers to hide narcotics or aliens. Imposing a requirement of reasonable suspicion in order to conduct a gas tank search would remove a significant deterrent to illegal smuggling in gas tanks and could actually encourage such smuggling. Because other containers and vehicular compartments may be searched without any level of suspicion, smugglers may well shift to gas tanks as the preferred container to hide contraband. Similarly, a reasonable suspicion requirement would inevitably lead to fewer gas tank searches, with the resulting increased risk of illegal entry of unwanted items and persons into this Nation.

C. The historical antecedents to the statute authorizing suspicionless searches of conveyances, 19 U.S.C. 1581(a), make clear that the same Congress that adopted the Fourth Amendment regarded such searches as reasonable. The earliest customs laws "authorized customs officers to board and search vessels bound to the United States, and to inspect their manifests, examine their cargoes, and prevent any unlading while they were coming in." *Maul* v. *United States*, 274 U.S. 501, 505 (1927); see Act of Aug. 4, 1790,

ch. 35, 1 Stat. 145. Similarly in 1799, Congress granted customs officials the plenary authority to search the baggage of persons seeking entry into the United States. Act of Mar. 2, 1799, ch. 22, § 46, 1 Stat. 662. The fact that Congress has long authorized suspicionless searches of conveyances and items at the border strongly supports the conclusion that customs officials may search, without reasonable suspicion, vehicular compartments, including gas tanks.

D. The government's essential interest in conducting gas tank searches outweighs the minimal intrusion imposed on the individual whose vehicle is subject to search. A gas tank search entails far less intrusion on privacy interests than the searches of personal items (such as clothing, wallets, purses, and luggage) that may be conducted at the border without any suspicion. The removal, disassembly, and reassembly of a vehicle's gas tank is a relatively brief procedure that can readily be performed without adversely affecting the safety or operation of the tank and vehicle.

E. The Ninth Circuit erred in *Molina-Tarazon* by imposing a requirement of reasonable suspicion. The court of appeals understated the government's interest and overstated the private interest at stake. A gas tank search is neither dangerous nor intrusive, and requires no more force than many common border searches. Accordingly, the Fourth Amendment does not require reasonable suspicion to conduct such searches.

ARGUMENT

A GAS TANK SEARCH AT THE BORDER WITHOUT REASONABLE SUSPICION IS CONSISTENT WITH THE FOURTH AMENDMENT

"Border searches, * * * from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside." *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977). Essential to the government's ability to protect the Nation from the entry of drugs, weapons, explosives, and unauthorized persons and things is the power to conduct searches of containers crossing an international border. "The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country." *Id.* at 620. Under those long-standing principles, a search of the gas tank of a vehicle, without reasonable suspicion, is reasonable when conducted at the international border.

A. This Court's Decisions Recognize The Broad Power Of Customs Officers To Conduct Suspicionless Searches Of Items At The Border

This Court has made clear that the government has plenary authority to conduct routine searches at the border without any level of particularized suspicion. *Montoya de Hernandez*, 473 U.S. at 538 ("[r]outine searches of the persons and effects of entrants [at the border] are not subject to any requirement of reasonable suspicion, probable cause, or warrant"). Particularly intrusive searches may fall outside of the category of a routine search, such that the applicable Fourth Amendment rule is one of reasonableness with the

required level of suspicion determined by balancing the government's "longstanding concern for the protection of the integrity of the border" against the individual's limited privacy expectations at the border. *Id.* at 538-540; see *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 588-593 (1983) (conducting balancing test in upholding constitutionality of the suspicionless boarding of vessels by customs officials for document inspection).

In *Montoya de Hernandez*, the Court held that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal." 473 U.S. at 541. The Court also stated that it was "suggest[ing] no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches." *Id.* at 541 n.4. The Court's opinion thus suggests that a search becomes nonroutine only when its level of intrusiveness equals or exceeds the type of highly invasive searches at issue and identified in *Montoya de Hernandez*. See *United States* v. *Ramos-Saenz*, 36 F.3d 59, 61 n.3 (9th Cir. 1994) ("[A] border search goes beyond the routine only when it reaches the degree of intrusiveness present in a strip search or body cavity search."); *United States* v. *Braks*, 842 F.2d 509, 512 n.5 (1st Cir. 1988) (noting that whether search involves a person or an object "may affect the threshold level of invasiveness at which a search is categorized as non-routine rather than routine").

Whatever the appropriate rule when a highly invasive search of the person occurs at the international border, a thorough search of a person's effects does not invoke a requirement of heightened suspicion before

the search can be deemed reasonable. A "routine" border search thus encompasses a thorough inspection of closed containers that are within or part of a vehicle. Such searches, since the early years of the Nation, have required no reasonable suspicion. *Montoya de Hernandez*, 473 U.S. at 537-538.

The search at issue here involves a container—the vehicle's gas tank—that smugglers often use to conceal contraband and aliens. The search poses a limited intrusion on the individual whose vehicle is subject to the search, and the search is certainly far less intrusive than the searches of the person characterized as non-routine in *Montoya de Hernandez*. A gas tank search therefore falls well within the scope of a routine border search. The routine character of a search is defined not by the frequency of its occurrence but by the nature and degree of its intrusiveness. *United States* v. *Cardenas*, 9 F.3d 1139, 1148 n.3 (5th Cir. 1993) ("Although the Supreme Court has never determined what makes a border search 'routine,' lower courts have generally classified routine searches as those which do not seriously invade a traveler's privacy."), cert. denied, 511 U.S. 1134 (1994). Simple removal and disassembly of a gas tank is not highly intrusive.

Alternatively, even if the definition of a routine search were thought not to embrace disassembly of closed containers attached to or part of a vehicle, such as a gas tank, the Fourth Amendment balance allows gas tank searches at the border without requiring reasonable suspicion. The government's ability to conduct thorough searches of vehicles at the border, without meeting a requirement of particularized suspicion, is essential to maintaining border security, and that important interest outweighs the modest intrusion on the individual privacy interests at stake.

B. A Suspicionless Gas Tank Search Is Justified By The Government's Interest In Inspecting All Vehicular Compartments In Which Contraband May Be Concealed

1. *The authority to conduct suspicionless border searches is intrinsic to sovereignty*

The government has a unique and vital interest in "protect[ing] the Nation by stopping and examining persons entering this country." *Montoya de Hernandez*, 473 U.S. at 538. That interest stems from the inherent authority of a sovereign to protect its territorial integrity and is reflected in the "broad, comprehensive powers" granted Congress "[t]o regulate Commerce with foreign nations." U.S. Const. Art. I, § 8, Cl. 3. *United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 125 (1973). It requires no "extended demonstration" to prove "[t]hat searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *Ramsey*, 431 U.S. at 616.

The Court has long distinguished searches and seizures of vehicles within this country, which require probable cause, from border searches, which do not. As explained in *Carroll* v. *United States*:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. *Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country*

to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.

267 U.S. 132, 153-154 (1925) (emphasis added). Similarly, "[t]he authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity. By reason of that authority, it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry." *Torres* v. *Puerto Rico*, 442 U.S. 465, 472-473 (1979); see also *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973) ("It is * * * without doubt that [the power to exclude aliens] can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders.").

"At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives." *Montoya de Hernandez*, 473 U.S. at 544; accord Pet. App. 11a (Declaration of Jayson P. Ahern, Director, Field Operations, for the Southern California Customs Management Center) (The "primary mission at Customs is ensuring border security, working on anti-terrorism initiatives, and interdicting drugs, contraband, and dangerous materials, while maintaining the smooth flow of legitimate travel and trade."). Congress has recently reaffirmed the close link between national security and border security by placing the government's border security and immigration enforcement responsibilities in the newly established Department of Homeland

Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2177 (charging agency with, *inter alia*, "[p]reventing the entry of terrorists and the instruments of terrorism into the United States," "[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States," and "[c]arrying out * * * immigration enforcement functions").[1]

2. *The government has the authority to conduct suspicionless searches of closed containers within a vehicle crossing the border*

Consistent with the inherent sovereign authority to protect the Nation from the entry of unwanted items and persons, customs officials at the border may search, without reasonable suspicion, not only a person's outer clothing, pockets, shoes, wallets, purses, and baggage, *e.g.*, *United States* v. *Grotke*, 702 F.2d 49, 51 (2d Cir. 1983); *United States* v. *Sandler*, 644 F.2d 1163, 1169 (5th Cir. 1981) (en banc); *United States* v. *Carter*, 592 F.2d 402, 405 (7th Cir.), cert. denied, 441 U.S. 908 (1979); *United States* v. *Stornini*, 443 F.2d 833, 835 (1st Cir.), cert. denied, 404 U.S. 861 (1971), but also containers and concealed and opaque compartments within a vehicle where contraband may be found. "[I]t is too well established to require citation of authority that [border] searches are unique * * *. Thus every person

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[1] Customs officials face a formidable task in protecting our borders from the smuggling of unlawful items and aliens in vehicles. In Fiscal Year 2002, more than 129 million vehicles carrying more than 330 million passengers entered the United States through the ports of entry along the Nation's land borders. Dep't of Homeland Security, *National Workload Statistics* (visited Nov. 25, 2003) <http://www.cbp.gov/xp/cgov/toolbox/about/accomplish/national_workload_stats.xml>.

crossing our border may be required to disclose the contents of his baggage, and of his vehicle, if he has one. * * * Even 'mere suspicion' is not required." *Henderson* v. *United States*, 390 F.2d 805, 808 (9th Cir. 1967); accord *United States* v. *Sandoval Vargas*, 854 F.2d 1132, 1139 n.17 (9th Cir.) ("A border search [without reasonable suspicion] of a person or vehicle includes a search of any suitcases, packages, or other articles accompanying the person or contained within the vehicle."), cert. denied, 488 U.S. 912 (1988); *Molina-Tarazon*, 279 F.3d at 713 (border "searches of handbags, luggage, shoes, pockets and *the passenger compartments* of cars are clearly routine" and may be conducted without reasonable suspicion) (emphasis added).

The authority to search containers and concealed areas of a vehicle crossing the border reflects the practical reality that "[c]ontraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container." *United States* v. *Ross*, 456 U.S. 798, 820 (1982). "During virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *Id.* at 820 n.26. The government's authority to conduct thorough inspections at the border necessarily includes the authority to conduct a complete search of all places and containers within a vehicle where contraband may be stored.

3. The government has a special interest in searching gas tanks which are often used to conceal the illegal entry of drugs and aliens

The government's broad authority to search compartments and containers within vehicles crossing the border applies with particular force to gas tanks, which are one of the largest and most commonly used opaque containers for smuggling contraband and persons across the border. Over the last five and one-half years, approximately 25% of all drug seizures at land border crossings in the Southern California area arose from attempts to smuggle drugs in a vehicle's gas tank. During that period, there were 4619 drug seizures from gas tanks in the Southern California area alone. Pet. App. 12a (Declaration of Jayson P. Ahern). Along the California border, "[g]as tanks have been and continue to be the primary concealment area used to smuggle and hide drugs in vehicles." *Ibid.* Customs officials also advise that the same fact is true along the entire southern border of the United States, with seizures from gas tanks representing over 25% of all narcotics seizures from fiscal year 2000 through fiscal year 2003.

Significantly, gas tanks represent a relatively sizeable compartment of a vehicle that criminals have modified or altered to smuggle not only large quantities of drugs, but also persons. As the Assistant Director for Inspectors for the San Diego District, Immigration and Naturalization Service, Diane Hinckley, has explained, "[i]nstances of persons smuggled in and around gas tank compartments are not uncommon at the ports of entry, averaging one approximately every ten days at [the] San Ysidro and Otay Mesa [ports of entry]." Pet. App. 16a. Such smuggling poses significant health and safety risks to the persons being smuggled. *Id.* at 16a-17a. "Because these cases occur regularly,

inspectors often search gas tank compartment areas and other compartment areas as part of a routine vehicle examination or in a random block blitz of vehicles." *Id.* at 16a.

4. *A requirement of reasonable suspicion would undermine the government's interest in border security*

In the view of the Ninth Circuit, the disassembly of a gas tank of a vehicle to inspect for contraband—even when there is no other practicable means of determining what the gas tank contains—violates the Fourth Amendment unless customs officials possess reasonable suspicion that the gas tank conceals contraband. Such a rule deprives customs officials of an essential tool to protect against the smuggling of drugs, persons, weapons, and other contraband. Removal and disassembly of the gas tank is a highly effective means to search for contraband hidden within the tank. That process may be the only practicable alternative for the government to determine whether the gas tank has been modified or altered. *Molina-Tarazon*, 279 F.3d at 712 & nn.2-3 (noting the presence of manufacturer-installed anti-siphoning valve in gas tank that blocked the use of fiberoptic scope). And that process may be the most direct and efficient way to determine whether the tank is being used for smuggling. *Id.* at 712 (observing that dog failed to alert to marijuana hidden in gas tank). The government accordingly must have wide latitude to remove and, if necessary, to disassemble a vehicle's gas tank to deter and detect illegal smuggling into this country—which involves not only the smuggling of drugs and of aliens, but also of bombs, explosives, or other implements of terrorism that likewise may be concealed in gas tanks. *Infra*, p. 18.

5. *A requirement of reasonable suspicion could increase successful gas tank smuggling*

A requirement of reasonable suspicion would remove the significant deterrent effect of suspicionless searches and could actually encourage criminals to use gas tanks as a means of smuggling contraband. The power of customs officials to conduct random searches "is an important deterrent to smugglers using gas tanks and other compartments to smuggle contraband, because they would believe that gas tanks and other compartments, *as with other areas in a vehicle*, could be searched randomly and with no level of suspicion." Pet. App. 12a-13a (Declaration of Jayson P. Ahern) (emphasis added). The Ninth Circuit's decision poses a serious risk of affirmatively increasing the level of gas tank smuggling since would-be smugglers are likely to hide contraband in gas tanks rather than other compartments of the vehicle that are subject to inspection without any level of suspicion (such as luggage, trunks, and glove compartments).

A requirement of reasonable suspicion may also chill officers from conducting gas tank searches when those officers believe that their grounds for suspicion may not pass muster with the courts. Cf. *United States* v. *Rivas*, 157 F.3d 364, 368 (5th Cir. 1998) (dog's "casting" in presence of vehicle did not provide reasonable suspicion to conduct search). Officers may fear personal liability should a court later determine that the officers lacked reasonable suspicion. The resulting decrease in the frequency of gas tank searches and seizures thus poses a serious risk that gas tank smuggling will increase. As an Assistant Director for immigration inspectors noted in this case with respect to the smuggling of persons:

> To require reasonable suspicion for an INS inspector to search a gas tank compartment area * * * will likely result in fewer gas tank compartment area * * * searches, additional persons being successfully smuggled in gas tank compartment areas * * *, and more attempts to use gas tank compartment area * * * for alien smuggling. Smugglers detect weak points readily and exploit them. * * * Requiring reasonable suspicion to search gas tank compartment areas * * * could lead to gas tank compartments * * * becoming the preferred choice for alien smuggling in the Southern District of California.

Pet. App. 16a-17a (Declaration of Diane Hinckley).

The above analysis applies with equal force to the smuggling of narcotics and other hazardous substances into the United States. For example, customs officials recently intercepted one would-be terrorist, Ahmed Ressam, who entered the country by driving a vehicle across the border with explosives hidden in the trunk that he intended to detonate at LAX airport. *United States* v. *Ressam*, 221 F. Supp. 2d 1252, 1254 (W.D. Wash. 2002). If a vehicle's trunk can be searched without reasonable suspicion but its gas tank cannot, it creates an appreciable risk of encouraging terrorists to use gas tanks as a means to avoid the detection of explosives or other hazardous substances crossing the country's borders. In short, a requirement of reasonable suspicion to conduct searches of one of the most commonly used vehicular compartments for concealing smuggled items would greatly impair the ability of the United States to deter, detect, and prevent the unlawful smuggling of dangerous items and persons across our borders.

Respondent argues (Br. in Opp. 19-20) that the government has not demonstrated that customs or immigration inspectors regularly conduct *suspicionless* gas tank searches. But the power to do so can serve as an effective deterrent, whether or not such searches occur frequently. In any event, the relative frequency of searches that are not prompted by particularized suspicion based on objective facts is not the test for determining whether customs officers can search without reasonable suspicion. Rather, the power to conduct searches without individualized reasonable suspicion derives from the unique border context where the sovereign's interest is at its apex. *E.g.*, *Ramsey*, 431 U.S. at 619 ("Import restrictions and searches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations.") (quoting *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. at 125). Thus, customs officials have blanket authority to conduct a thorough search of arriving passengers' baggage and the passenger compartments of vehicles, such as the trunk and glove compartment, whether or not the customs officials, as a practical matter, ordinarily conduct such inspection only when they suspect the presence of contraband. *Witt* v. *United States*, 287 F.2d 389, 391 (9th Cir.) ("That the customs authorities do not search every person crossing the border does not mean they have waived their right to do so, when they see fit."), cert. denied, 366 U.S. 950 (1961).

C. A Suspicionless Gas Tank Search Is Consistent With The Historical Plenary Statutory Power To Conduct Thorough Searches Of Items And Conveyances Crossing The Border

Not only do national sovereign interests justify, as reasonable under the Fourth Amendment, a suspicionless search of a gas tank, but the historical roots of the statute authorizing such searches confirm the compatibility of such searches with the Fourth Amendment. *Kyllo* v. *United States*, 533 U.S. 27, 40 (2001) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted.") (quoting *Carroll*, 267 U.S. at 149); accord *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 326 (2001).

1. *Customs officials have always had the plenary authority to conduct routine searches at the border*

The power of customs officials to conduct searches at the border has an "impressive historical pedigree." *Villamonte-Marquez*, 462 U.S. at 585. "Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Montoya de Hernandez*, 473 U.S. at 537; accord *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. at 125 ("Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry."). "It has always been understood that the sovereign had plenary power to control the introduction of contraband across its borders from abroad and to insure its physical security and protect its revenue by a thorough search of all persons and

chattels entering the country." Jules D. Barnett, *A Report on Search and Seizure at the Border*, 1 Am. Crim. L.Q., Aug. 1963, at 36, 39; accord *Lee* v. *United States*, 14 F.2d 400, 404 (1st Cir. 1926) ("It is the universal practice, and has always been recognized as lawful, for officers of the customs, at boundaries between this and contiguous nations, to stop travelers on foot or by vehicle crossing such boundary to examine and search to determine whether they and their effects may properly be permitted to enter the country. This authority has been exercised for national self-protection."), rev'd on other grounds, 274 U.S. 559 (1927).

The gas tank search in this case was authorized by 19 U.S.C. 1581(a), which states that customs officials "at any time may go on board of any vessel or vehicle * * * and examine, inspect, and search the vessel or vehicle and every part thereof * * * and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance." That statute derives from a statute passed by the First Congress, the Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 164, see *Villamonte-Marquez*, 462 U.S. at 584, which "authorized customs officers to board and search vessels bound to the United States, and to inspect their manifests, examine their cargoes, and prevent any unlading while they were coming in." *Maul*, 274 U.S. at 505.

Section 31 of the 1790 Act permitted customs and revenue officers "to go on board of ships and vessels * * * for the purposes of * * * examining and searching the said ships or vessels," and provided that the officers "shall have free access to the cabin, and every other part of a ship or vessel" to seal and mark containers and packages that were to remain on the ship. 1 Stat. 164. The Act also gave customs officers the power to place inspectors on board ships "to examine the

cargo or contents" of ships entering the country, and authorized the seizure and forfeiture of goods upon violation of the Act. Act of Aug. 4, 1790, ch. 35, §§ 27, 28, 30, 50, 60, 70, 1 Stat. 163-164, 170, 174, 177. Because the 1790 Act was passed by the same Congress that promulgated the Fourth Amendment, "it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment." *Ramsey*, 431 U.S. at 617 (quoting *Boyd* v. *United States*, 116 U.S. 616, 623 (1886)).[2]

The statutory authority conferred by 19 U.S.C. 1581(a) is plenary and entitles customs officials to search, without suspicion, concealed and opaque compartments, such as the vehicle's gas tank, where contraband is often secreted. The fact that Section 1581(a)'s antecedents reach back to the Nation's origins further supports the conclusion that it is compatible with the Fourth Amendment.

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[2] In *Ramsey*, this Court observed that the earliest customs statute, Act of July 31, 1789, ch. 5, 1 Stat. 29, was passed two months before Congress proposed the Bill of Rights and contained an "acknowledgment of plenary customs power" to conduct warrantless inspections of vessels. *Ramsey*, 431 U.S. at 616; accord *Montoya de Hernandez*, 473 U.S. at 537. The 1789 Act granted customs officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed"; in contrast, searches of any "particular dwelling-house, store, building, or other place" were authorized with a warrant upon "cause to suspect." § 24, 1 Stat. 43. That provision was carried forward in the Act of Aug. 4, 1790, ch. 35, § 48, 1 Stat. 170, and is distinct from the separate authority of customs to conduct suspicionless searches of articles and effects when presented for entry at the border.

2. The authority to conduct suspicionless gas tank searches is also supported by the historical authority to conduct suspicionless searches of luggage

The plenary authority conferred by Section 1581(a) is also consistent with other similar grants of long-standing statutory power to conduct thorough searches of luggage, another type of container that may conceal the unlawful entry of items into the country. Shortly after the adoption of the Fourth Amendment, Congress granted customs officials the plenary authority to search the baggage of persons entering the country in order to ensure the payment of appropriate duties on imported goods. Act of Mar. 2, 1799, ch. 22, § 46, 1 Stat. 662 (authorizing a customs official, "whenever the collector * * * *shall think proper so to do*," "to direct the baggage of any person arriving within the United States, to be examined") (emphasis added).[3]

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[3] Today, such authority is conferred by, *inter alia*, 19 U.S.C. 1461, which provides:

> All merchandise and baggage imported or brought in from any contiguous country, except as otherwise provided by law or by regulations of the Secretary of the Treasury, shall be unladen in the presence of and be inspected by a customs officer at the first port of entry at which the same shall arrive; and such officer may require the owner, or his agent, or other person having charge or possession of any trunk, traveling bag, sack, valise, or other container, or of any closed vehicle, to open the same for inspection, or to furnish a key or other means for opening the same.

See also 19 U.S.C. 1496 ("The appropriate customs officer may cause an examination to be made of the baggage of any person arriving in the United States."); 19 U.S.C. 1582 ("all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents").

"The luggage carried by a traveler entering the country may be searched at random by a customs officer; the luggage may be searched no matter how great the traveler's desire to conceal the contents may be." *Ross*, 456 U.S. at 823; accord *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion of White, J.) ("Customs officers characteristically inspect luggage * * * ; it is an old practice and is intimately associated with excluding illegal articles from the country."); *Von Cotzhauzen* v. *Nazro*, 107 U.S. 215, 218 (1882) ("[A]ll the vexatious and annoying machinery of the custom-house, and the vigilance of its officers, are imposed by law to prevent even the smallest evasion" of the revenue laws.). The long-standing right of customs officers to conduct random searches of baggage and luggage of persons crossing the border supports the similarly broad authority of customs officers to conduct suspicionless searches of closed containers within the vehicle, including the gas tank, where smuggling frequently occurs.[4]

[4] The earliest customs statute that was directed to vehicles authorized customs officials to "stop, search, and examine any vehicle, beast, or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law." Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 232; *Carroll*, 267 U.S. at 151; *Ross*, 456 U.S. at 806 n.7; cf. *supra*, note 2. That authority now resides in 19 U.S.C. 482, which the lower courts have held to authorize searches at the border to be conducted without regard to reasonable suspicion. *Sandoval Vargas*, 854 F.2d at 1139; *Sandler*, 644 F.2d at 1169.

D. Gas Tank Searches Involve A Minimal Intrusion On Individual Interests

The removal, disassembly, and reassembly of a gas tank only minimally intrudes on the privacy interest of the individual whose vehicle is subject to the search at the border. People do not store personal items, other than fuel (and illegal contraband), in gas tanks, and a search of a fuel tank does not entail any personal embarrassment or indignity. Cf. *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."). Indeed, the privacy interests implicated in a search of a vehicle's gas tank would appear to be far less than those implicated by border "searches of handbags, luggage, shoes, pockets, and the passenger compartments of cars" (*Molina-Tarazon*, 279 F.3d at 713)—searches that are considered routine and may occur at the border without any level of suspicion. See also *ibid.* ("Object searches certainly do not cause the same degree of personal indignity as searches of the human body.").

The procedure involved in a gas tank search also involves no extraordinary intrusion on either the individual or his vehicle. The disassembly and removal of a gas tank is a relatively easy and straightforward procedure that may be readily performed by automobile mechanics.[5] The disassembly of respondent's gas tank

[5] See, *e.g.*, http://www.pelicanparts.com/techarticles/914_gas_tank_remove/914_ gas_tank_remove.htm (visited Nov. 25, 2003) ("removing and repairing the tank is an easy task"); http://www.c3sharktank.com/tech2/rear4.html (visited Nov. 25, 2003) ("Removal of the gas tank is a fairly easy process."); http://www. forwardlook.net/mail-archive/msg07778.html (visited Nov. 25, 2003) ("Pulling the tank is straightforward."); http://www.1inamillioncars.

in this case was completed within 15 to 25 minutes. Pet. App. 5a, 7a-8a.

The procedure also involved no destruction of the gas tank and was reversible by reassembling the tank. As the inspector who performed the procedure in this case testified:

> At most, my hammering off the bondo [from the tank] slightly scratched and possibly slightly dented the gas tank, but the gas tank was just as workable as it was before I removed the bondo. The gas tank was not damaged as far as safety and workability were concerned. This did damage the bondo, but new bondo could easily have been applied. * * *
>
> The force used to lower the gas tank was not damaging. The straps were undone, some bolts were unscrewed, and some hoses were disconnected. Nothing was permanently altered and nothing was damaged. I have witnessed this procedure hundreds of times in my five years of working as a border inspector. It was easy to disconnect the tank, and it would have been easy to connect it back again. The gas tank could have been reconnected without damaging it or the vehicle.

Pet. App. 8a; see also *Molina-Tarazon*, 279 F.3d at 712 ("The mechanic hoisted the truck onto a lift and removed several bolts and straps that connected the tank to the truck, disengaging electrical connections and hoses in the process. The mechanic then removed the sensing unit, revealing thirty-one packages of marijuana inside the tank."); *id.* at 719 (Brunetti, J.

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com/mb/1960sCarsArticles/gastankremoval.html (visited Nov. 25, 2003) ("The whole job shouldn't take more than ½ hour, it is easy.").

concurring) ("The search at issue here is an example of the simple disassembly of a gas tank in the ordinary course of inspection. * * * This inspection was conducted in a matter of 10-15 minutes with no permanent alteration or resulting harm to Molina-Tarazon's vehicle."). Although the tank here was not immediately reconnected upon discovery of the drugs, in cases where "no contraband is discovered, it is Customs' policy to reassemble and reinstall any gas tanks that are disassembled during a border search." Pet. App. 13a (Declaration of Jayson P. Ahern).

Respondent argues (Br. in Opp. 15) that a gas tank search is "highly intrusive" because there is delay occasioned by the policy of customs officials to contact a qualified mechanic to remove the tank from the vehicle. The presence of a mechanic to assist in a search of a vehicle, however, poses no intrusion on the vehicle's owner or passengers. There is also no lengthy or unreasonable delay associated with waiting for the arrival of a mechanic to safely remove the gas tank. See Pet. App. 7a (Declaration of Jovito Pesayco) (mechanic arrived within 20-30 minutes); *Molina-Tarazon*, 279 F.3d at 712 (mechanic arrived within 15-20 minutes). Many inspections at the border may involve specially trained personnel or some incidental delay without converting the inspection into a nonroutine or highly intrusive event. *E.g.* Pub. L. No. 107-296, § 421, 116 Stat. 2182; President's Reorganization Plan, H.R. Doc. No. 32, 108th Cong., 1st Sess. 4 (2003) (transferring agricultural inspectors to Bureau of Customs and Border Protection).

"Consistently * * * with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the

international border than in the interior." *Montoya de Hernandez*, 473 U.S. at 538. Accordingly, "not only is the expectation of privacy less at the border than in the interior, the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck must more favorably to the Government at the border." *Id.* at 539-540; see also Note, *From Bags to Body Cavities: The Law of Border Search*, 74 Colum. L. Rev. 53, 56 (1974) ("Since, ostensibly, all travelers may be uniformly searched, no opprobrium attaches to the execution of this search. * * * Moreover, the traveler stands on notice that he will be searched."). As demonstrated, the intrusion on the individual whose vehicle is subject to a gas tank search is limited. The individual interest in avoiding that intrusion is outweighed by the government's paramount and well-established interest in protecting the border from the entry of unwanted items and effects that may be concealed in vehicular compartments.

E. The Ninth Circuit's Analysis Is Flawed

In holding that the removal and disassembly of a gas tank was a nonroutine search requiring reasonable suspicion, the Ninth Circuit in *Molina-Tarazon* erred by failing to give any weight to the government's interest in securing the border by conducting suspicionless searches of a vehicle's gas tank. Rather, the court of appeals reasoned that "[t]hree aspects of the search here render it nonroutine: Force was used to remove and disassemble the fuel tank; the procedure involved some risk of harm; and someone whose vehicle was subjected to a search is likely to feel a diminished sense of security." 279 F.3d at 713. Reliance on each of those factors was flawed, and they do not support the conclusion that the suspicionless removal and disassembly of a gas tank is unreasonable.

1. The use of force in a gas tank search does not justify a requirement of reasonable suspicion

The Ninth Circuit critically erred in relying on the fact that a gas tank search requires "the use of tools" and "the use of force" in the removal of the tank from the vehicle. *Molina-Tarazon*, 279 F.3d at 714. The only force involved in a gas tank search is the nondestructive removal and disassembly of the tank, and that procedure can easily be reversed upon completion of the search without any effect on the tank's safety or operation. *Supra*, pp. 25-26. In the most basic of border searches, customs officers must often use force, such as removing packing tape from a box or prying open a crate.

It is also unrealistic to expect customs officials to discharge their duties in protecting the border without the broad ability to engage in some acts of disassembly. "For example, if the lock is jammed on a suitcase or its owner refused to present a key, [customs] agents have to employ some degree of force to gain access to its interior." *Molina-Tarazon*, 279 F.3d at 714; see also 19 U.S.C. 1461 (requiring person at border upon request to "open * * * for inspection" any "trunk, traveling bag, sack, valise, * * * other container, or * * * closed vehicle," or "to furnish a key or other means for opening the same"); 19 U.S.C. 1581(a) (authorizing customs officials to "use all necessary force to compel compliance").

Customs officials likewise face a wide variety of other circumstances in which disassembly may be necessary to conduct a complete search of a vehicle or vessel. *E.g. United States* v. *Flores*, No. 98-50288, 1998 WL 746085, at **1 (9th Cir. Oct. 20, 1998) (162 F.3d 1170) (Table)

(border search involving use of screwdriver to dismantle a stereo speaker in trunk of car); *Hammond* v. *United States*, 356 F.2d 931, 932 (9th Cir. 1966) (border search involving car air filter that secreted heroin); *King* v. *United States*, 348 F.2d 814, 816 (9th Cir.) (border search involving specially-built trunk compartment that concealed amphetamine), cert. denied, 382 U.S. 926 (1965); see also Joel Millman, *On Trips to Mexico, Some Americans Bring Back Mexicans*, Wall St. J., Nov. 17, 2003, at A1 (reporting that in one recent weekend, "border officials pulled 130 people from trunks, door panels and under the seats of various vehicles. On Friday, officials caught * * * two would-be immigrants hidden under the hood of his truck. On Saturday, inspectors pulled a man from a Pontiac Grand Prix in which the gas tank had been removed to create a "clavo," or secret compartment."). Customs officials also advise that they commonly find, only after some use of force or disassembly, contraband hidden in secret compartments in vehicular trunks, doors, seats, dashboards, floorboards, and spare tire compartments. A rule that the use of force triggers a requirement of reasonable suspicion would encourage smugglers to conceal their contraband in vehicular compartments or containers that are not easily opened for inspection, with unacceptable adverse consequences to border security.

2. *The Ninth Circuit's belief that a gas tank search poses a danger is without foundation*

The court of appeals also reasoned, that in its view, "the procedure involved some risk of harm," because "[a]n error in removing, disassembling and then reassembling the portion of a vehicle that contains a highly flammable and potentially explosive substance

like gasoline might well result in disastrous consequences for the vehicle's owner." *Molina-Tarazon*, 279 F.3d at 713, 715. The court of appeals' perception of the safety risks associated with the removal, disassembly, and reassembly of the gas tank, however, is entirely speculative. The court pointed to no reported instance of any mechanical error, much less an accident, associated with a gas tank search.

Nor is Customs aware of any such instance. Gas tank searches occur several hundred times a year in Southern California alone. *Infra*, p. 15. Customs officials advise that, although most searches of gas tanks reveal the presence of contraband or aliens, some negative searches result. In fiscal year 2003, for example, 348 gas tank searches conducted along the Southern border were negative; the tanks were reassembled; and the vehicles involved continued their entry into the United States. Moreover, Customs informs us that such services are performed under contract by qualified mechanics who are employed as regular mechanics in Southern California by other employers.

3. *A gas tank search is not psychologically intrusive*

The court of appeals also found a gas tank search to be "psychologically intrusive," because the court believed that an individual subjected to such a search would experience fear or a "diminished sense of security" associated with driving a "potentially unsafe" motor vehicle reassembled by a mechanic not chosen by the individual. *Molina-Tarazon*, 279 F.3d at 713, 715, 716. As discussed, the procedure is straightforward and performed only by qualified mechanics. Finally, given the absence of any empirical basis for concluding that gas tank searches pose a danger to the driver of the vehicle or its passengers, any fear occasioned by

being informed of a gas tank search would be unreasonable. See *id.* at 719 (Brunetti, J., concurring) ("The risk of negligent reassembly or replacement may create fear that would never be overcome in any circumstances, including the simplest dismantlement.").

Accordingly, the rationale of the Ninth Circuit is unsupported factually and legally. The quick, safe, and nondestructive removal of a gas tank is well within the parameters of a thorough inspection that international travelers should reasonably anticipate when seeking entry into this country.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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NOVEMBER 2003